



**SHREWSBURY PLANNING BOARD
SHREWSBURY, MASSACHUSETTS**

MINUTES

Regular Meeting: September 9, 2004 - 7:00 P.M.

Location: Selectmen's Hearing Room - Municipal Office Building

Present: Melvin P. Gordon, Chairman
Stephan M. Rodolakis, Vice-Chairman
Jill R. Myers Clerk
Kathleen M. Keohane
Donald F. Naber

Absent: John D. Perreault, Town Engineer

Also Present: Eric Denoncourt, Engineer/Planner

Mr. Gordon opened the meeting at 7:00 P.M.

1. Approved Minutes of August 5, 2004

The Planning Board approved the Minutes of August 5, 2004 Regular Meeting and Executive Session as submitted.

2. Signed bills.

3. Meetings and Hearings

7:00 P.M. Board Member Comments

There were no Board Member comments.

**7:05 P.M. Grand View, Section I, Definitive Subdivision
Continued Public Hearing (from February 5, 2004)
(Decision Deadline: November 15, 2004)**

Mr. Gordon said Attorney David Brown has asked for a continuance to the Board's next regularly scheduled meeting.

Mr. Gordon continued the hearing to November 4, 2004, at 7:05 P.M.

4. New Business

a. Signed updated Form for Recording Plans at the Worcester Registry of Deeds

The Board resigned the signature sheet for the recording of plans at the Worcester Registry of Deeds adding Mr. Naber as the new member, replacing Kevin Capalbo.

b. Southwoods Open Space Improvements – There was no discussion. To be put on October 7, 2004 regular meeting agenda.

c. Discussed ANR Plan for 398 Walnut Street

Mr. Gordon said Alan and Susan McIlvane, 398 Walnut Street, submitted an ANR plan to the Town Engineer's office and on August 25, 2004, it was denied. He said the McIlvanes wanted to bring it to the Planning Board for further review.

Mr. McIlvane said they want to create three parcels on their property. Mrs. McIlvane said what they understand is Parcel A is part of the subdivision, so they are asking for that 4,000 sq. ft. to be subdivided into three parcels.

Mr. Gordon said it is his understanding there are some issues with Brendon Homes that The McIlvanes would have to resolve even if the Board releases the covenant.

Mr. McIlvane said not with respect to making the lots ANR. Mrs. McIlvane said there is a landscape easement. Mr. Gordon asked about access. Mr. McIlvane said if access to Tralee Lane were to be desired, they would have to work something out with the developers of Southwoods, Mr. Giblin. He said access to Tralee Lane is not the only option. Mrs. McIlvane said Walnut Street is another option.

Mr. Gordon noted that Lot C definitely would have access on Walnut Street. He said Lot B could possibly have access on Walnut Street, in a common driveway with Lot A would bring them to Walnut Street. He asked if that was their plan. Mr. McIlvane said they aren't sure what their plan is, they are just exploring options. He said the first step is to make ensure that they get ANR lots and then they will take the next step whatever that may be.

Mrs. McIlvane said back when Robert Moss, the first developer, initially presented the plan for Southwoods Development, he showed two water and sewer stubs going into Parcel A. She said his comment at that time was, "We might as well do it now because we know that there will be houses there someday." She said there are two water and sewer stubs brought in to Parcel A from Tralee Lane. Mr. McIlvane said Lot C can be accessed from Walnut Street, and Lot A and Lot B have stubs into them right now for water and sewer.

Mr. McIlvane said they should talk about the restrictions on the 10-foot grading strip. He said the property was deeded to them, unbeknownst to them; they found out when they got a tax bill. The Tax Assessor gave Mrs. McIlvane a copy of the deed which had been deeded to them. He said, not being lawyers, they thought it was fine.

Mr. McIlvane said they get a P & S in their hands, and there are landscape restrictions on the property that preclude access to Tralee Lane, affecting the middle lot. Mr. McIlvane said the restriction was a surprise to them and it should be a surprise to the Planning Board, because this is not the understanding in which they wish the property be deeded to them. He said they are going to explore the options for removing it.

Mr. Gordon said no matter what the Board does, the McIlvanes will still have to get releases from Brendon Homes. Mr. McIlvane said they will if they want access to Tralee Lane, and he said he has indication that he doesn't want to work with them.

Ms. Keohane asked for more information on the 10-foot deeded space. Mr. McIlvane explained this. He said the deed says, "you may not move the fence or the arborvitae (which he didn't even put in), they must be maintained in place," and if the fence is not to be maintained in place, there is no access to the lots because it runs about 300 feet along Tralee Lane (Lot B).

Mrs. McIlvane said when Mr. Moss came before the Planning Board with the Southwoods proposal, he stated that 10-feet was for grading and he either had to buy a 10-foot grading easement from them, or he would have 10-feet of his property for grading and then deed it to the abutter at the end of the development, and the Planning Board decided that that would be at the end of Phase 1 of the development.

Mr. Naber and Ms. Keohane asked for clarification on the access of these lots. Mrs. McIlvane said the one that they really have the problem with, with the landscape easement that Mr. Giblin put in, is the middle lot, because that is where the fence and arborvitae is continuous across the frontage on that one.

Mr. Denoncourt said the question is the issue on the Covenant that states, "the subdivision is limited to the 43 lots." Mr. Gordon said the Board can change that if they come back to us. Mr. Denoncourt said the Board could decide to release Parcel A from the Covenant that could clear up the subdivision on Parcel A.

Mr. Rodolakis noted that this won't eliminate the private restriction. Mr. Gordon said it's not going to eliminate the private restriction, that's a private matter between two private parties. There was further discussion on this.

Mr. McIlvane said even though restrictions are on that 10-foot strip, that should not preclude them being ANR lots, in their opinion, because they don't have to go through those lots to access Tralee Lane to make them lots, because there can be a common driveway. Mr. Denoncourt said there has to be frontage and access from the frontage to the buildable portion of the lot, and the question is whether or not the restrictions restrict access.

Mr. Denoncourt said his discussions with Mr. Perreault, the Town Engineer was that most situations of access relate to grade, or wetland crossing, and he doesn't know if there is a case for man-made.

Mr. Gordon asked the Board if they want to release the Parcel A from the Covenant as a start. Mr. Rodolakis said he doesn't have an issue with that; he has an issue with Lot B, and endorsing an ANR plan at this point, without knowing more.

Mrs. McIlvane asked wouldn't the access issue come up at the building permit time. Mr. Gordon said no, the Board has to be sure of access. Mrs. McIlvane said there's access from Walnut Street and access from Tralee Lane, through a common driveway with the lot that's furthest in. Mr. Gordon said the access to Lot A will not become available until Tralee Lane becomes a public street, and the access to Lot C exists, so the question is Lot B.

Mr. McIlvane asked if there was a plan of when Tralee Lane will move from a private to a public way. Mr. Denoncourt explained that's up to the developer. He said an ANR can be signed for frontage on a way approved in accordance with the subdivision control law, that's one of the options. He said Lot A does have frontage on a way approved in accordance with the subdivision control law. Mr. Gordon asked if signing the ANR, the Board would not be stating that Lot B was a buildable lot.

Ms. Keohane asked what the original intent was when this was divided. Mrs. McIlvane gave the history of what happened.

Mr. McIlvane noted that in the plans approved by the Board originally, do not show a fence on that property at all. He said they do not show anything on that strip of land subsequent to the closing of Phase I. They brought surveyors out there, after the fence was in, and they put it on another plan and submitted that to the courthouse, as an as-built plan. He said in there opinion that was not how this should have been done.

Mr. Rodolakis said he was on that Planning Board and he came away with the belief that they were getting ANR lots, however, he said they were probably very careful in the words that they used.

Mr. McIlvane said he talked to Bob Moss just a few weeks ago, and he said that was the intent. He said Mr. Moss said he had nothing to do with this change. Mrs. McIlvane said that it says that Parcel A goes to the abutters at the end of Phase I. Mr. McIlvane asked why they would put water and sewer in to someone's property and then deny them access to it.

Mr. McIlvane said they are exploring options to get the restriction removed.

Mr. McIlvane said he feels like the Planning Board was deceived in the sense that those lots did not show any building, whatsoever, on that 10-foot strip when the Board approved the plan, and then subsequent to that, they went back and made another change.

Mr. Gordon asked how the McIlvanes felt about having until next month to resolve the issue and then come back to the Board, and then at that time the Board can release the Covenant, if it's the Board's desire, and there might be more information, so the Board can make a decision.

Mr. McIlvane said communications between them and the person involved are zero.

Mr. Gordon expressed concern that there isn't real access, even though it's being said that there is access. He said he would like to get better advice on that. He said if he were sure of the access, he said he would have no problem. He said he was sure of the access on Lot C, and he probably is sure of the access on Lot A, but he wasn't sure of the access for Lot B.

Mr. McIlvane said when he spoke with Mr. Denoncourt, he suggested the possibility of a common driveway from Lot C into Lot B.

Mr. Rodolakis suggested they talk to a lawyer, and commented that there had been some recent case law regarding easements. He said he would be comfortable releasing from the Covenant, but wouldn't be comfortable signing the ANR plan.

The Board voted to continue the hearing to November

5. Old Business

a. Discussed and Signed the Decision for Highland Hill, Definitive Subdivision

Mr. Rodolakis commented that he sort of struggled with the subdivision from the beginning. He said he had concerns about the adequacy of access, as well as the potential diminution in the level of service at certain intersections. He said, after consideration of the proponents' presentation and the proponents' traffic consultants, and the mitigation efforts, he stressed that this proponent did do a significant amount of mitigation particularly as it concerns the intersection of Prospect Street and North Street, as well as, the Cross and North Street intersection, that when coupled with their presentations swayed my decision on that issue. He said, otherwise, with respect to the internal mechanics of the subdivision, as modified, on account of the wetlands issue, he didn't think there is much in the way of internal issues, as the proponent has satisfied everything, including stormwater issues. He said he is in favor of authorizing the Clerk to sign the Decision.

Mr. Gordon commented that there are three members voting on this.

Ms. Myers commented that she felt it was a tough decision to make because the proponent didn't ask for any waivers, so it fits into the criteria of the other potential development plans that were proposed, are certainly less advantageous to us. She said she agrees with Mr. Rodolakis, that the proponent put forth the mitigation efforts that she felt was necessary, over and above, what the Board really could have asked for, at least in her opinion, so she said she would vote in favor of it.

Mr. Gordon commented that he would agree. He said the Board's charge is safety, and he said he felt safety was addressed by the proponent in doing his mitigation, and in his traffic study, and nothing of the contrary came from the abutters' traffic study, and in fact, and believes in places she mentioned that the study was accurate.

The Decision was signed by Mr. Gordon, Ms. Myers, and Mr. Rodolakis.

b. Reconsider ANR Plan for 7 Ira Avenue

Attending the hearing was Attorney Rod St. Pierre, representing Joe Pepper – the owner of the property. Attorney St. Pierre said this plan was submitted back in the Spring. He said it was decided by the Town Engineer, Jack Perreault, and the Planning Board, not to be allowed.

Attorney St. Pierre said he wasn't involved at that time, but that, as he understands it, the Board and Mr. Perreault felt that Ira Avenue did not provide sufficient width, suitable grades and access for the subdividing of this property. He said Ira Avenue consists of two homes. He said the street is paved to the frontage of these two homes and then turns into a gravel road. He submitted photos showing the area.

Attorney St. Pierre commented that this house and the house across the street are about 90 years old. He said access for this property comes off of Pond Avenue. He said the garage is free standing.

Attorney St. Pierre said when Mr. Pepper decided to subdivide this property, and met with various people in the Town, there was sufficient frontage with lot size to divide this into two lots. He said, in reviewing the decision regarding no access, there definitely is access to this property and there has been for 90 years.

Attorney St. Pierre said the proposal was to have a driveway easement off Pond Avenue to service the house. He said one thing that they talked to the surveyor, Kevin Jarvis, about doing, after this came about, and there was a problem, was put a 12-foot wide section on the property line, on the westerly boundary line onto Pond Avenue, and make that part of Lot #2, so there'd be frontage on both streets, not just driveway access.

Attorney St. Pierre said after discussions with Mr. Pepper about the problem, they decided that, if in fact, the grading is an issue, then this should be a candidate for a variance from the Zoning Board of Appeals. They were denied at the ZBA.

Attorney St. Pierre said they are back asking the Board to reconsider their decision of back in April, 2004. He said the property is a private street, it is maintained by the Town of Shrewsbury, as far as plowing, and town water services these two houses.

Attorney St. Pierre said Pond Avenue is level flat, has no grade to it whatsoever, and there are services off a new house off of Eaton Avenue. He said in reviewing the case law, as long as the lot is fully accessible, Planning Board approval is not required. He said they can amend the plan to put a 12-foot frontage on Pond Avenue.

Attorney St. Pierre said the only access is definitely off Pond Avenue. He said there is 190 feet of frontage off of Ira Avenue that services this lot, and looking at the grades, he can come in from the rear portion of it, as it borders Rice Avenue, if in fact that was the case that level access was needed.

Attorney St. Pierre commented that in 31 years of practice, he's never seen a problem like this, so he's trying to figure out why there is an issue here. He said in Section 81M Legislative Intent, the intent feels that as long as adequate access is safe and convenient for travel, that it should be allowed. He said they are dealing with two houses on a private street, and there's definitely adequate access for travel to get in to and from this property.

Attorney St. Pierre said when the decision was made by Mr. Pepper to subdivide this property, and in the due diligence that he had in making sure this would work, he went ahead and had perc tests done and septic design plans done, and completed before the Form A was submitted. He said maybe this wasn't the right way to go, but he had all the reason to believe that everything was fine.

Attorney St. Pierre restated that access is sufficient and it is safe, to allow this lot. He said the new lot is going to be on Pond Avenue, all the access is going to be on Pond Avenue. He said this is a house that's been in existence for 90 years, and because this house fronts on Ira, Mr. Perreault felt that the grades were not sufficient to provide access.

Attorney St. Pierre said this house was built prior to subdivision rules and regulation and zoning by-laws. Mr. Rodolakis noted that he and Mr. Gordon were in favor of the variance at the zoning board of appeals hearing. There was discussion on the width of the road. Attorney St. Pierre said it really depends where you start and stop the measurements, but he noted that the asphalt stops at these two houses.

Mr. Gordon said the issue before the Zoning Board was, was there a hardship and could Rice Avenue be used as access. Attorney St. Pierre said there needs to be 100-feet of frontage. He said, if in fact, the plans showed Ira Avenue with the frontage, with 190-feet, which is sufficient, to seek the variance, he would then go to Rice Avenue, if that was the issue, for access.

Mr. Gordon asked Mr. Pepper if he would not be adverse to either an easement or a deed onto to Pond Avenue. Attorney St. Pierre said they wouldn't, and said Mr. Jarvis has already reconfigured the lot to the jogs that are around the house, he eliminated some of the jogs are that around there – take 12-feet along the westerly boundary line for frontage onto Pond Avenue, and that would create the driveway from Pond Avenue into the house – that would be their preference, to amend the plan, and do all that. Attorney St. Pierre said they could put no access from Ira Avenue, even if the Board wanted to restrict that as well.

Mr. Rodolakis asked if they had talked to the abutters. Attorney St. Pierre said the other thought was to purchase property from the Aldriches, which financially wouldn't make sense, plus where they have mortgages on the property, and try to get partial releases, it takes a long time. Mr. Rodolakis and Attorney St. Pierre noted that there were no abutters at the ZBA meeting.

Mr. Gordon asked if there was intention to further divide these lots. Attorney St. Pierre said no. Mr. Gordon said that could be a restriction also. Attorney St. Pierre said that was fine.

Mr. Gordon asked, on the paved portion of Ira Avenue, if two cars can pass. Mr. Pepper thought they could, but noted there's never been two cars trying to pass at the same time.

Ms. Keohane said when she went out there, she came around Pond, to Rice, to Ira, and noted that you can't see over the top of the road, and I just didn't see if anybody was coming if there would possibly be room for another car coming up there. Attorney St. Pierre said if you're behind and you're going to go on Pond Avenue, which is flat and level to go out to Route 70. He said if you come off of Route 70, they typically either going to go up Pond Avenue again or the ones living in the two houses that are there, use Ira Avenue.

Attorney St. Pierre noted that there are other lots in this Town and streets, along the lake, that the grades are much more severe than these. He restated the statute and legislative intent is to provide access. He said he felt there was access, and there was no question about it. He said he couldn't find anything in case law that really supports the decision to deny this.

The Board voted that they have reconsidered and endorsed this ANR plan. Attorney St. Pierre said he will work out the restriction with Mr. Denoncourt, regarding 12-feet coming in off of Pond Avenue, and that will be part of the new plan.

6. Correspondence

Respectfully Submitted,

Annette W. Rebovich